IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term A. D. 1953

No. ——

STATE OF WASHINGTON DEPARTMENT OF GAME; STATE OF WASHINGTON DEPARTMENT OF FISHERIES; and WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., a corporation, *Petitioners*,

v.

FEDERAL POWER COMMISSION and CITY OF TACOMA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioners respectfully show:

I

SUMMARY STATEMENT OF MATTER INVOLVED

The State of Washington and its departments of Game and of Fisheries are charged with the duty of

enforcing the laws, rules and regulations of such state relative to conservation of food fish and game fish.

The Washington State Sportsmen's Council, Inc. is a non-profit corporation of the state and is dedicated to the preservation and protection of the natural resources of the State of Washington.

The City of Tacoma is a municipal corporation of the State of Washington.

The City of Tacoma filed application on December 28, 1948, (later supplemented) for a license under the Federal Power Act to construct and operate a proposed hydroelectric development, designated as Project Number 2016, to be located on the Cowlitz River in Lewis County, Washington.

The two aforesaid Washington State Departments and the Washington State Sportsmen's Council, Inc. became parties to the proceeding by an order of the Federal Power Commission permitting intervention.

Following public hearings, submission of testimony, exhibits and briefs. a recommended decision by the presiding examiner, exceptions filed thereto, and oral argument, the findings and basic order now under review were issued by the Federal Power Commission on November 28, 1951.

After denial of rehearing by said Commission, and within the time prescribed by statute, a petition for review was filed in the Court of Appeals for the Ninth Circuit. On October 5, 1953, the Court of

Appeals rendered a decision (207 F. (2d) 391) sustaining the Commission and its Order, and in so doing, held in effect that the statutes of the State of Washington relative to conservation of its natural resources were repugnant to the laws of the United States, to-wit, the Federal Power Act, 16 U. S. C. 791 *et seq.*, and therefore must fall.

The above mentioned project proposed by the City of Tacoma would consist of two dams on the Cowlitz River, one at Mossyrock and the other at Mayfield, together with appurtenant reservoirs, generating facilities, and alleged fish protective facilities.

The Mossyrock Dam, located at river mile 65, would rise 325 feet above tailwater and its reservoir would extend some 21 miles upstream.

The Mayfield Dam, located at river mile 52, would rise 185 feet above tailwater and its reservoir would extend upstream to the tailwater of the Mossyrock Dam, a distance of about 13½ miles.

Both of these dams are situated within the migratory range of the anadromous fish that utilize the Cowlitz River, and their construction is expressly prohibited by the State Statute (Chapter 9, Laws of 1949; RCW 75.20.010; Appx. 1 to this brief), commonly called the Sanctuary Act, which makes fish sanctuaries out of the Cowlitz River and other lower Columbia River tributaries and prohibits the construction of dams over 25 feet in height

on such rivers within the migratory range of anadromous fish.

The City of Tacoma has not obtained a hydraulic permit from the state for the construction of the dams and the right to use the water of the river as required by the state law (Secs. 46 and 49, Chap. 112, Laws of 1949; RCW 75.20.050 and 75.20.100; Appx. 2 to this brief).

It has likewise failed to obtain the approval of the Director of Fisheries and the Director of Game of the State of Washington for its proposed fish protective facilities in connection with the dams as required by the above cited state laws.

The Cowlitz River drains the western slope of the Cascade Range from Mount Rainier south to Mount Adams and Mount St. Helens, all in southwestern Washington. From its headwaters in the glaciers of Mt. Rainier the river flows generally southwest a distance of 67.7 miles to its junction with the Columbia River at Longview, Washington. The entire river and all of its watershed are wholly within the State of Washington.

The watershed of the Cowlitz is in a remote and isolated part of the state. Except for some areas which have been logged, almost all of the watershed remains in a natural, primitive condition. The watershed is almost entirely devoid of industrial development, and the river and its tributaries have but few diversions for agricultural or domestic purposes. The flow of the river system is largely the same as it

was prior to the advent of the white man's civilization. This fact, together with the temperature, food content and chemical qualities of the water, make the river system an ideal environment for the propagation of anadromous fish (Tr. 2929-2932, Ex. 30, p. 1).

The Cowlitz River is the most important producer of fish in the lower Columbia River system (below Bonneville Dam) and in the entire Columbia basin is exceeded in this respect only by the Snake River (Tr. 2932, 2388, Ex. 30, p. 1).

The principal species of fish produced in the waters of the Cowlitz are spring Chinook salmon, fall Chinook salmon, silver salmon, steelhead trout, cutthroat trout and smelt.

The gross annual value of the salmon produced in the river has been conservatively placed at $2,000,000.00, with about half being produced above the Mayfield dam site and half below (Ex. 30, p. 2; Tr. 2854; Ex. 25, pp. 7-8).

The steelhead and cutthroat trout are not fished commercially but provide an important recreational fishery difficult to measure in a monetary manner, and which contributes greatly to "better living" in the area (Ex. 25, p. 5).

The smelt, whose annual commercial value has been as high as $300,000.00, spawn in the main river below Mayfield (Tr. 2972).

Most of the testimony before the Commission was devoted to the question of whether the proposed

fish facilities, or any fish facilities that might be proposed in view of the available knowledge on this subject, would be able to preserve the runs of fish not utilizing the river. The Petitioners, as interveners in the proceedings, produced 13 expert witnesses on this subject. They constituted a group of trained biologists and engineers who for years have worked in the salmon resource field and who, individually, and as a group, have participated in the design of every major salmon protective facility in our country and Canada. They were of the opinion that there is no known method of maintaining productive runs of fish above these proposed dams. They were further of the opinion that the proposed dams would have a damaging effect on the runs of fish below the dams (Ex. 30, pp. 3-6; Tr. 2141, 2924, 2921, 3006, 3264, 3265).

The applicant (City) produced but one expert witness on this question. While his general background as a fishery biologist was broad, his experience with salmon was limited and his participation in the design of salmon protective facilities was nil. He, alone, among all the experts, held hope that the protective facilities could be made to work, but conceded that more experimentation was needed (Tr. 1692, 1693, 1697, 1698, 1699, 1700, 1703, 1704, 1705, 1710, 1722, 1725, 1727, 1731, 1737, 1738).

The order of the Commission likewise recognizes that the applicant failed to produce satisfactory

proof that its fish protective facilities would work, and provided for further experimentation.

Thus, it is apparent that the order of the commission, and the decision of the Court of Appeals upholding it, destroys, or at least places in serious jeopardy, a natural state resource with an annual value in excess of $2,000,000.00.

The Court of Appeals has misinterpreted and improperly applied the Federal Power Act and *First Iowa Hydroelectric Co-op v. Federal Power Comm.*, 328 U. S. 152, to nullify and hold inoperative the above mentioned state laws and permit construction of the project in question.

II

The Basis Upon Which This Court Has Jurisdiction to Review

The opinion of the Court of Appeals (Ninth Circuit) was entered and filed on October 5, 1953, and is reported in 207 F. (2d) 391. This Supreme Court has jurisdiction to review such decision under the provisions of law as contained in 28 U. S. C. 1254 (1) (2) (62 Stats. 928) and 16 U. S. C. 825(l) (49 Stats. 860).

Cases sustaining jurisdiction of this Supreme Court are: *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152; *U. S. v. Appalachian Electric Light Co.*, 311 U. S. 377; *Ford and Son v. Little Falls Fibre Co.*, 280 U. S. 369.

III

The Questions Involved

1. The State of Washington, by statute and in protection of its fishery resources, has prohibited the building of any dams in excess of 25 feet in height on the Cowlitz River. The Federal Power Commission, by its Order of November 28, 1951, has issued a license to the City of Tacoma to construct two dams on the Cowlitz River, in complete disregard of such state statute and without compliance with other applicable state laws. Does the Federal Power Act confer such authority upon the Commission, and are said state statutes superseded and rendered inoperative by the Federal Power Act?

2. Finding No. 59, of the Commission's Order of November 28, 1951, is that the proposed project is best adapted to a comprehensive plan for improving or developing the Cowlitz River. Is there substantial evidence to support such Finding?

3. The Federal Power Commission, in its Order of November 28, 1951, did not find that the construction of the proposed dams would be in the public interest without the inclusion of adequate fish protection devices. Articles 30 and 31 of said Order, however, make no adequate provision for the determination of the effectiveness of said devices, provide for the management of a state resource by the City of Tacoma to the exclusion of the sovereignty of the State of Washington, do not require the City of Ta-

coma to prove the effectiveness of the fish protective devices, direct issuance of the license and permit commencement of the construction of the dams before said effectiveness is determined, and provide for further essential proceedings without opportunity for Petitioners to be heard. Is such authority conferred upon the Federal Power Commission by the Federal Power Act?

IV

Specification of Errors to Be Urged

The Court of Appeals (Ninth Circuit) erred:

1. In holding that the state Sanctuary Act and other applicable laws of the State of Washington are inoperative and do not constitute a bar to the construction of these dams.

2. In holding that Finding number 53 of the Commission's Order of November 28, 1951, was supported by substantial evidence, and in failing to hold that said Finding number 53 was contrary to Section 9(b) and Section 27 of the Federal Power Act.

3. In failing to hold that the Commission's Order of November 28, 1951, constituted administrative legislation violative of the provisions of the Constitution and laws of the United States.

4. In holding that there was substantial evidence to support Finding number 59 of the Commission's Order of November 28, 1951, and in failing to hold that said Finding number 59 is in complete variance with and contradictory to Findings 36, 37, 38 and 39 of said Order.

5. In holding that there was substantial evidence to support the Commission's Findings and Con-

clusions contained in its Opinion and Order of November 28, 1951, that the proposed dams are necessary in the interest of national defense.

6. In failing to hold that the Federal Power Act did not confer upon the Federal Power Commission authority and discretion to disregard and destroy an important natural resource of the State of Washington, and in holding that the Federal Power Commission had not abused its discretion in regard thereto.

7. In failing to hold that the large and important runs of anadromous fish in the Cowlitz River would be substantially destroyed by the construction of these dams.

8. In failing to hold that Articles 30 and 31 of the Commission's Order of November 28, 1951, constitute an unlawful extension of the authority of the Commission; that said Articles make no adequate provision for the determination of the effectiveness of the fish protective devices; that said Articles provide for further essential proceedings without opportunity for Petitioners to be heard; and that said Articles are so indefinite and inadequate that Petitioners cannot be advised of their rights.

9. In affirming the Commission's Order of November 28, 1951.

V

Reasons Relied On For The Allowance of This Writ

1. The decision of the Court of Appeals renders inoperative state statutes enacted for the protection of a natural resource of the state and permits the destruction of that resource. It therefore involves a question of great substance and extreme general importance relating to the Constitution and laws of the United States. 2. It reaches that result on a misinterpretation and misapplication of the Federal Power Act and the decisions of this Court. 3. The decision below is in conflict with the ruling of the Court of Appeals for the District of Columbia in *Niagara-Mohawk Power Corporation v. Federal Power Commission*, 202 F. (2d) 190, Cert. granted 345 U. S. 955.

1. The decision of the Court of Appeals, insofar as it holds invalid the state Sanctuary Act and other related statutes of the State of Washington, would permit a direct appeal to this court (28 U. S. C. 347, Judicial Code 240), except for the limiting language in Section 313(b) of the Federal Power Act, 16 U. S. C. 825 (1)(b).

The pertinent state statutes in this proceeding (the Sanctuary Act, the Hydraulic Code, and the statutes relative to fish protective facilities) were passed by the state in the exercise of what is generally conceded to be the highest attribute of sover-

eignty—the protection of its natural resources under its police powers. The question to be determined is whether the Congress (if such power be invested in Congress) in the Federal Power Act conferred upon the Federal Power Commission authority to issue a license where the licensee is a municipality which has completely failed to comply with applicable state laws relative to the resources in question, and where the project itself is prohibited by state laws passed for the protection of the state's natural resources. There is therefore involved the question of whether the authority of a federal administrative agency, acting under the limited powers conferred upon it by Congress, supersedes the valid enactments of a state law passed for the protection of its natural resources. Since the question involves the power of a state to protect its resources as opposed to authority of a federal agency acting under statutory powers, the question is obviously one of general importance.

The issues to be determined in this case affect resources that are of substantial value to the Northwest and to the nation as a whole.

The monetary and recreational value of the Cowlitz as a producer of fish has been previously outlined, but to understand its importance in this respect it is necessary briefly to note some of the history of the Columbia River basin and the plans of private, state and federal agencies for its development.

Before the arrival of the white man in the northwest the entire Columbia River system, from its headwaters in Canada to its mouth, was extensively used for the propagation of anadromous fish, particularly salmon (Tr. 3595-3596; Ex. 43-A). However, civilization brought environmental changes such as divided watersheds, industrial pollution, irrigation diversions, and physical barriers such as dams, log jams, etc., that have made vast portions of the river system either unsuitable or inaccessible for anadromous fish. The Coulee Dam alone made inaccessible hundreds of miles of what were once excellent spawning grounds for salmon. The same result has been accomplished on a smaller scale by dams on tributary streams. It is presently estimated that when all dams now in construction, or authorized for construction, are completed, that more than 70% of the entire river system will be forever lost for fish propagation (Tr. 3597-3610, Ex. 43-6).

The preservation of a substantial part of the remaining fish populations in the Columbia River system has been a matter of great concern to the state and federal agencies responsible for planning the orderly development of the Columbia River basin, and after exhaustive study and analysis they have prepared a program which, if followed, will permit the development of all of the resources of the area without the sacrifice of any.

This plan is set forth in the "Review Report on Columbia River and Tributaries", prepared by the

Corps of Engineers, and officially noted in this matter. The report was submitted to the Secretary of Army on June 28, 1949, and was thereafter submitted to Congress.

Basically, the plan provides for the development of the upper river system for power, reclamation and related purposes and the preservation of the lower river system for the propagation of fish.

The plan is much too lengthy to review in detail. Suffice to say that it reviews in detail the potentialities of all the streams in the river systems and outlined the manner in which they might best be developed to serve the economy of the area (Tr. 93-102).

In this connection it is pertinent to note that the report outlines in detail the resources of the Cowlitz River system and specifically notices the power potential of the Mayfield and Mossyrock sites. However, the development of the river for power, flood control and navigation is not recommended because of the conflict with the fishery resources of the river (Tr. 99).

After agreement was effected between the Corps of Engineers and the Bureau of Reclamation, the plan was submitted for comment to various federal agencies, including the Federal Power Commission. On June 21, 1949, the Commission wrote the Chief of Engineers a letter in which it approved the plan as constituting a "desirable and coordinated basic framework for the comprehensive development and

utilization of the water resources of the Columbia River" (House Document 531, Tr. 98).

As a supplement to the comprehensive plan, the U. S. Fish & Wildlife Service developed the *Lower Columbia River Fisheries Plan.* This plan was officially noted by Chief of Engineers who recommended favorable consideration of the plan by Congress (Tr. 86-93).

The fisheries plan provides for increasing the fish producing potential of the Lower Columbia River streams, including the Cowlitz, by stream improvement, removal of barriers, hatcheries, abatement of pollution, screening of diversions, etc. (Tr. 88). Under the plan the actual work would be financed by federal funds and would be performed by the states of Oregon and Washington under the supervision of the U. S. Fish & Wildlife Service (Ex. 33).

While Congress has not formally approved this plan, it provided $1,000,000 in 1949, $1,100,000 in 1950, and $2,205,000 in 1951, to carry out the program which contemplates the expenditure of $20,000,000 over a ten year period (Ex. 30, p. 1).

The wholehearted endorsement by the State of Washington of the comprehensive plan and the fisheries plan is evidenced by the action of its legislature, which in 1949 passed what is commonly referred to as the "Sanctuary Act", which is fully set out in Appx. 1. The law, in effect, makes fish sanctuaries

out of the tributaries of the Lower Columbia River, including the Cowlitz, and prohibits the construction of structures in the rivers over 25 feet in height. There is no dispute that the terms of the Act prohibit the construction of the dams in question.

Another independent agency has studied and reported on the problem of best utilizing the water resources of the Columbia basin. The President's Water Resources Policy Commission discusses the Columbia at length in Volume 11, "Ten Rivers in America's Future". The problem of the Cowlitz is specifically mentioned (Tr. 189-195). The view of the President's Commission can be best summarized by stating that they agree with the opinion of the Corps of Engineers that the greatest good will be accomplished by preserving the integrity of the Lower Columbia River Fishing Plan by deferring multi-purpose development of sanctuary streams (including Cowlitz) until the power requirements of the future make necessary the development of the full power potential of the entire Columbia River system (Tr. 189-195).

While the U. S. Fish and Wildlife Service did not appear as a party in this controversy, two of its staff appeared and stated that their views and the material they presented represented the official view of the department and had been formally approved by the department's highest officials. One of these, Mr. Barnaby, in speaking of the Columbia River fisheries plan, stated, "The Cowlitz may be consid-

ered as a keystone of that program and nothing should be done that might diminish or jeopardize its present or potential productivity". (Ex. 30, p. 2.)

He was also of the opinion that the program might as well be abandoned if the dams are built.

The foregoing constitutes the policies determined by all interested agencies at the time the city's application was under consideration by the Federal Power Commission.

Thus it is apparent that the project which is authorized is in direct conflict with well considered official plans and policies for the development of the entire river basin with due regard for resources of all kinds. Further, the construction of such project as now authorized by the decision of the Court of Appeals will destroy or place in serious jeopardy an extremely valuable resource of the state.

Because of the substance and general importance of the issues here, and because the decision of the Court of Appeals erred in the particulars heretofore noted, it is in the general interest that these questions be resolved by this court.

2. The Court of Appeals based its decision herein upon *First Iowa Hydroelectric Co-op v. Federal Power Comm.*, 328 U. S. 152. We assert that the Court of Appeals has misinterpreted and misapplied both the Federal Power Act and the decisions of this court, particularly this court's decision in the *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152.

The Federal Power Act, 16 U. S. C. A. 791a to 825r, does not purport to destroy the natural resources of any state or to confer upon the Federal Power Commission such authority; but, on the contrary, the Act expressly withholds such authority from the Commission and unequivocally states the intention of the Congress to be that such resources shall be managed and controlled by the laws of the respective states.

Section 27 of the Federal Power Act is a saving clause reserving certain rights to the states as follows:

> "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective states relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 16 U. S. C. A. 821.

The several statutes of the State of Washington relating to uses of water and the protection of its fishery are clearly within the police power of the state. It is unquestioned law that the intention of Congress to exclude the states from the exercise of their police power must be clearly expressed and will not be implied. *International Union U. A. W. v. Wisconsin Employment Retirement Board*, 336 U. S. 245; *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Allen-Bradley Local, etc., v. Wisconsin Employment Retirement Board*, 315 U. S. 740; *H. P. Welch Co. v. New Hampshire*, 306 U. S. 79; *Carey v.*

South Dakota, 250 U. S. 118; *Reid v. Colorado*, 187 U. S. 137.

The very language of the Federal Power Act negates any intention of Congress to exclude the states from the exercise of their police power, and, in fact, expresses an exactly contrary intention.

Upon three occasions this court has considered the intention of Congress as expressed in the Federal Power Act and in respect to the applicability of state laws.

In *Ford and Son v. Little Falls Fibre Co.*, 280 U. S. 369, this court said:

> "* * * The present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by State law, without compensation."

Citing cases, this court then referred to Sections 10(c), 27, 21 and 6 of the Act, and continued as follows:

> "While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from these laws may be subordinate to the power of the national government to regulate commerce upon them, they, nevertheless, so restrict the operation of the entire Act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration * * *."

One of the most recent decisions interpreting the Federal Power Act is the case of *Grand River*

Dam Authority v. Grand-Hydro, 335 U. S. 359, wherein this court said:

> "* * * As to the question whether the Federal Power Act should be interpreted as actually superseding the state law of condemnation and as restricting the measure of valuation which lawfully may be used by the Court of Oklahoma in a condemnation action for the acquisition of land for power site purposes, there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws."

In *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, one of the issues before this court involved the ascertainment of the intent of Congress, and the court referred specifically to a section of the Reclamation Act substantially similar to Section 27 of the Federal Power Act. The language of the court, included in a footnote, is as follows:

> "The Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U. S. C. Section 371 *et seq.*, 43 U. S. C. A. Section 371 *et seq.*, to which Congress adverted, applies only to the seventeen Western States. Section 8 provides: 'That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof * * *' 43

U. S. C. A., Section 383. To the extent that it is applicable this clearly leaves it to the State to say what rights of an appropriator or reparian owner may subsist along with any federal right."

The *First Iowa Hydroelectric Co-op. v. Federal Power Comm.*, 328 U. S. 152, did not decide that the Federal Power Act, stemming from the commerce clause of the United States Constitution, could take precedence over the inherent right of a state to preserve and protect its fish in public waters of the state. On the contrary, this court has, almost without exception, held that, except where repugnant to the U. S. Constitution, the police power of the states has never been conceded to the United States. *Pregg v. Commonwealth of Pennsylvania*, 41 U. S. 539; *In re Slaughterhouse Cases*, 83 U. S. 36; *Lake Shore & M. S. Ry. Co. v. State of Ohio*, 173 U. S. 285; *Bacon v. Walker*, 204 U. S. 311.

In the *First Iowa* case, no question of the right of the state to legislate in protection of its natural resources was presented. The Iowa statute endowed the Executive Council of the state with the same power, the same duties and the same sphere of action as Congress has conferred upon the Federal Power Commission. To this extent, and to this extent alone, this court held that the licensee did not have to comply with the state laws.

In the case at bar the purpose and nature of the several state statutes are entirely different than any state laws considered in the *First Iowa* case. The

statutes of the State of Washington announce and set forth a state policy in respect to the diversion of water and the protection of its fishery resources, and it has been admitted by all parties that the City of Tacoma has failed to comply with the state laws and its proposed project is in direct violation thereof.

The question at this point is not whether Congress could so legislate as to preclude the operation and effectiveness of the state laws under consideration, but whether Congress has so legislated. It is our position that Congress has not delegated to the Federal Power Commission authority to override the several state statutes in question and, hence, permit the City of Tacoma to proceed in derogation of these state laws.

The conclusion above expressed is inescapable upon consideration of the entire Federal Power Act, including the sections previously set forth in this brief, and particularly is this true in relation to Section 27 of said Act.

In a footnote to the decision in the *First Iowa* case, this court refers to a Congressional debate upon the inclusion in another act of a section identical with Section 27. This reference, which appears in 51 Congressional Record 13630, is as follows:

> Mr. Mondell (Wyoming): "all that is asked of the Federal Government is to give those who seek to develop water power in the public land states an opportunity to use the public lands for that entirely legitimate and useful purpose . . .

> "Let us not forget that the primary and essential right upon which any enterprise of this character is based in the public land states is a right received from the people of the state and not the Federal Government. The people of the commonwealth of the West are the owners and proprietors of all the water within their borders, and the only right that any individual can have or secure, at least in the majority of the public land states, is the right to use the water at a certain designated place for specific and useful purpose; and the right continues so long as at that place for that purpose those waters are beneficially applied. The Federal Government can give no grant of right to build power plants on public lands in the western states that will carry with it the right to divert a drop of water or the use of a drop of water for the turning of a turbine. That right under the laws of the state, recognized by the Federal Constitution and the courts, must be secured from the people through the authority they have provided in the states. That right in all of the states is perpetual so long as the water shall be used at that place for that beneficial purpose."

Section 27 of the Act here in question refers to state laws relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses. Obviously, the specific words used do not in any way exhaust the general description since similar state laws may be invoked for many other purposes of the same general nature or character. This was expressly so held by the District Court in the case of *Alabama Power Company v. Gulf Power Co.*, 283 Fed. 606, which was cited with approval by this court in the *First Iowa* case.

The *Alabama Power Company* case refers specifically to other state laws within the same particular subject matter, as follows:

> "Section 27, in its specific enumerations does not exhaust the particular subject matter, since state laws may be invoked for the following purposes, to-wit, the construction of canals, or other artificial waterways, the construction of a drainage system, either to take fish from the navigable waters of the state, the rights of riparian owners with respect to the formation of ice on streams, the construction of wharfs, piers and docks, the right to shoot wild water fowls from boats under game laws, and perhaps others. These laws of the states are referred to and treated in the 27th volume of R. C. L., page 1061, along with the subjects of irrigation and municipal water supplies."

Each of the above types or classifications of state laws relates to legislation within the purview and scope of the police powers of the state as do laws relating to "irrigation" and "municipal uses." Each has to do with subjects, the regulation of which is a fundamental part of the sovereignty of the state and are of the *same nature* within the principle of *ejusdem generis.*

Certainly, upon principle and upon authority, the statutes of the State of Washington, set forth earlier in this brief, are laws relating to the control, appropriation, use or distribution of water within the phrase "other uses" as contained in Section 27 of the Federal Power Act and in complete accord with the principle of *ejusdem generis.*

Furthermore, both the state Sanctuary Act, RCW 75.20.010, and the state Water Code, RCW 90.20.010 to 90.24.070, relate or refer to dams for power purposes. It is too well settled to require extensive citation of authority that the construction of power dams is a proper municipal purpose or power. *The City of Tacoma v. Nisqually Power Company*, 57 Wash. 420, 107 Pac. 199.

These state laws, therefore, relate directly and unequivocally to the control, appropriation, use or distribution of water used for municipal uses. Hence, they are squarely within the protection of Section 27 of the Federal Power Act.

Finally, an analysis of the Federal Power Act as a whole, and the sections earlier set forth in particular, indicates clearly that Congress intended to accord to the several states the protection guaranteed them by the Fifth Amendment to the Constitution of the United States.

Respondent (City) has not shown, nor could it show, that there are no other sources of power which would supply that expected to be produced by the Cowlitz dams. Hence, these particular dams are not even claimed to be essential to the well being of the City of Tacoma. Contrary to the express mandate of the people of the State of Washington, acting through their legislature, the City of Tacoma, acting under purported license of the Federal Power Commission, intends to proceed toward the destruction of the Cowlitz fishery and to take for its own use the

property of the state. This certainly amounts to a gross discrimination against the people of the state and such has been held to constitute a deprivation of property without due process, contrary to the Fifth Amendment. *Steward Machine Company v. Davis*, 301 U. S. 548; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Petrillo*, 68 F. Supp. 845 (reversed on other grounds, 332 U. S. 1).

The Federal Power Act, therefore, would be contrary to the Fifth Amendment if the court should conclude that it authorized the City of Tacoma to destroy and take the property of the people of the State of Washington in derogation of the laws of the state and without compensation therefor.

3. The decision below is in conflict with *Niagara-Mohawk Power Corporation v. Federal Power Commission*, 202 F. (2d) 190, Cert. granted 345 U. S. 955.

The decision held that state water-use rights remain valid and compensable when encompassed in a federal licensed hydro-electric project, and that the federal license is not the source of water rights, but a permission to exercise them pursuant to state law. The Court of Appeals did not deny the long accepted proposition that Congress may exercise absolute power over the improvement of navigable streams. It held, however, that such authority was not necessarily exercised in the Federal Power Act.

In the opinion issued by the Court of Appeals, D. C. Circuit, in the *Niagara-Mohawk Power Corpo-*

ration v. Federal Power Commission case, the court stated, at page 207:

> "Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state's grant of authority. To be sure, a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the New River case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the First Iowa case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

At page 208, the said court stated further:

> "We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; * * * that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; *that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law*; * * *"

In the case at bar, Respondent, the City of Tacoma, has failed to comply with applicable laws of the State of Washington and the project is prohibited by the state Sanctuary Act. Consequently, the action of the court below, in affirming the ruling of the Federal Power Commission, and in holding that the several state statutes are inoperative, and hence not a bar to the issuance of the license, is squarely opposed to the ruling of the Court of Appeals for the District of Columbia in the *Niagara-Mohawk Case, supra.*

This court has granted certiorari in the *Niagara-Mohawk Case*, 345 U. S. 955, and the same reasons that prompted this court to review the decision in the *Niagara-Mohawk Case* equally require a review of the decision in the present case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Court of Appeals for the Ninth Circuit had in the case numbered and entitled on its docket, No. 13289, State of Washington Department of Game; State of Washington Department of Fisheries; and Washington State Sportsmen's Council, Inc., a corporation, Petitioners v. Federal Power Commission, Respondent, and City of Tacoma, Intervener, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the

judgment herein of said Court of Appeals for the Ninth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated December 21, 1953.

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